STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE NO. 25-2006:

BROCKTON TEACHERS' ASSOCIATION, Affiliated with the MEA, MFT, NEA, AFT, AFL-CIO,	)	Case No. 2442-2006
Complainant,	)	
vs.	)	
BROCKTON BOARD OF TRUSTEES,	)	
Defendant.	)	

and

IN THE MATTER OF UNFAIR LABOR PRACTICE NO. 2-2007:

BROCKTON PUBLIC SCHOOLS,	)	Case No. 290-2007
Complainant,	)	
vs.	)	
BROCKTON TEACHERS' ASSOCIATION, MEA, MFT, NEA, AFT, AFL-CIO,	)	
Defendant.	)	

FINDINGS OF FACT; CONCLUSIONS OF LAW; AND RECOMMENDED ORDER

I. INTRODUCTION

In this matter, Brockton Teachers Association (BTA) and the Brockton Board of Trustees (BOT) have each complained that the other has committed an unfair labor practice (ULP). BTA's allegations arise out of BOT's unilateral implementation of a transfer and

"reduction in force" policy that resulted in unilateral transfers and layoffs of teachers.[1] BOT's allegation arises out of its contention that BTA, despite being given several opportunities to do so, refused to bargain over a new collective bargaining agreement for the 2006-2007 school year. These matters were consolidated by order of Hearing Officer David A. Scrimm in an order dated September 26, 2006.

Hearing Officer Gregory L. Hanchett held a contested case hearing in this matter on November 2, 2006 in Brockton, Montana. At the time of the hearing, BTA withdrew that portion of its ULP which claimed that BOT failed to bargain over a successor collective bargaining agreement. Richard Larson, attorney at law, represented BTA. Michael Dahlem, attorney at law, represented BOT. Maggie Copeland, MEA-MFT representative, Judy Heupel, BTA officer and Brockton School District school teacher, Robert Smith, Superintendent of Brockton Schools, and Cheri Nygard, Brockton School District Clerk, all testified under oath. BTA's Exhibits A through F and BOT's Exhibits 1 through 5 and 7 through 35 were all admitted into evidence.

The parties were given the opportunity to present post-hearing briefs which briefs were timely received and the record was then closed. Based on the evidence adduced at hearing and the closing briefs of the parties, the following findings of fact, conclusions of law, and recommended order are made.

II. ISSUES

1. Did BOT commit an unfair labor practice by implementing a reduction in force and transfer (RIF) without bargaining with BTA over the adoption and implementation of that reduction in force?

2. Did BTA waive any right that it had to bargain over the adoption and implementation of the RIF?

3. Did BTA commit an unfair labor practice by not bargaining with BOT over a new collective bargaining agreement for the 2006-2007 school year?

4. If either side committed an unfair labor practice, what remedy should be imposed?

III. FINDINGS OF FACT[2]

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[1] The original MEA-MFT charge did not encompass a request for relief for teachers who were ultimately "RIFed" or transferred. Between the time the charge was filed and the matter transferred to the Hearings Bureau, RIFing and transfer occurred, resulting in BTA's request that its original charge be amended to include "specific relief for teachers adversely affected by BOT's implementation of its RIF policy." See BTA's Motion to Amend Charge and Memorandum In Support dated October 10, 2006. BOT had no objection to the amendment and it was granted.

[2] The findings of fact contain both those facts to which the parties stipulated as well as additional facts found by the hearing officer after hearing the testimony and considering the exhibits admitted in this case.

1. BOT is a "public employer" as defined in Mont. Code Ann. § 39-31-103(10).

2. BTA is a "labor organization" as defined in Mont. Code Ann. § 39-31-103(10).

3. The parties entered into a collective bargaining agreement effective from July 1, 2003 to June 30, 2006 (2003-2006 CBA). Articles 4.1 and 4.2 of the 2003-2006 CBA, governing the rights of BOT, state:

> 4.1. Rights and Obligations. Power and Duties of Trustees, Montana School law §20-4-324.
>
> 4.2. Effects of Laws, Rules and Regulations. The parties recognize the right, obligation, and duty of the District and its duly designated officials to promulgate rules, regulations, directives, and orders insofar as such rules, regulations, directives and orders are not inconsistent with the terms of this Agreement. The parties further recognize that the District, all teachers covered by the agreement, and all provisions of this agreement are subject to the laws of the state of Montana and federal laws. (Emphasis in original).

4. Article 13.2 of the 2003-2006 CBA states that during the term of the agreement, any change to the agreement may only be accomplished by "voluntary, mutual consent of the parties in written and signed amendment to this Agreement."

5. Articles 14.1 and 14.2 of the 2003-2006 CBA provide:

> 14.1. Effective Period. This agreement shall be effective as of July 1, 2003 and shall continue in full force and effect until June 30, 2006.
>
> 14.2. This Agreement will automatically be renewed and will continue in force and effect for additional periods of one year unless the Association or the District give notice to the other, not later than March 1st prior to the aforesaid expiration date or any anniversary of this agreement, and to negotiate over the terms of these provisions. [sic] The notice to reopen shall name those provisions. In the event that a successor agreement is not agreed upon before the termination date of this agreement, all provisions of this Agreement shall remain in full force and effect until an agreement is reached. All salaries, benefits, and working conditions agreed upon in the successor agreement will be retroactive to the termination date of this agreement.

6. Prior to the implementation of the 2003-2006 CBA, there had been one other time during which the parties had been unable to meet regarding implementation of a new collective bargaining agreement. When that occurred, the parties, in conformity with the language of that collective bargaining agreement (which, like the language of the 2003-2006 CBA, provided that the collective bargaining agreement then in force would automatically renew), treated that collective bargaining agreement for the following year as though it had automatically renewed.

7. On February 7, 2006, former District Superintendent Sherry Westergard informed BTA by letter of the possible need to engage in a reduction of force (RIF) due to declining enrollment in the district and shrinking district reserves. Exhibit 21. Between the 1999-2000 school year and the 2005-2006 school year, district enrollment dropped from 201 to 155 students. The district's financial reserves dropped from $753,905.00 to approximately $359,988.00. By the time of the hearing in this case, district reserves had dropped to $83,177.00 and student enrollment had dropped to 138.

8. Because of the declining enrollment and dwindling reserves between the 2005-2006 school year and the 2006-2007 school year, the district reduced the number of its teaching positions from 26 to 15.5 FTE and the number of its classified positions from 21 to 17. If the district had not undertaken these reductions, it could not have met its financial obligations for the 2006-2007 school year.

9. Neither party gave notice prior to March 1, 2006 of a desire to reopen the 2003-2006 CBA.

10. On March 2, 2006, BTA requested negotiations with BOT representatives on a successor agreement to the 2003-2006 CBA on the subjects of "salary, leave, language" and to "clarify extra curricular activities and substitute teacher wages." In response, BOT within a few days hired a negotiator for the purposes of bargaining over a successor agreement.

11. On April 13, 2006, the BTA offered to meet with BOT representatives on April 25, 26, May 1-4, 8, 11, 15 or 17, 2006. BOT did not agree to any of those dates.

12. On May 25, 2006, MEA Field Consultant Maggie Copeland sent a letter to Board Chairman Sammy Nygard indicating that she had learned that at the immediately preceding school board meeting that BOT intended to RIF tenured teachers. She also formally demanded to bargain over the "reasons and a procedure for a Reduction in Force." She also requested information about staff reductions and transfers.

13. Copeland received no response from the BOT and in a letter dated June 6, 2006, she renewed her request. On June 12, 2006, Copeland renewed her demand to negotiate over the RIF, noting that she had seen the agenda for the BOT board meeting scheduled which included topics about the reduction in force and teaching assignment transfers. Copeland also noted in her letter that she could not "understand why the district continues to ignore BTA's legal right to bargain over a reduction in force procedure."

14. In an e-mail dated June 12, 2006, BOT offered to bargain with the BTA on June 20, 21, or 29, 2006. Copeland responded in an e-mail dated June 16, 2006 that BOT's proposed dates would not work but that June 24 through June 27, 2006 would work.

15. On June 13, 2006, Copeland filed the predecessor to the instant unfair labor practice charge demanding, among other things, that "The defendant shall be ordered to immediately begin bargaining with the Complainant over a successor agreement."

16. In its June 30, 2006 response to BTA's ULP, BOT opposed the charge on three bases. Among other things, BOT asserted that it had no requirement to bargain over a successor agreement because the BTA did not give notice prior to March 1, 2006 of its desire to bargain over a new CBA. BOT went on to assert that BTA's failure to give timely notice to reopen the contract resulted in the contract's automatic renewal and thus there was no duty on the part of BOT to bargain over a successor agreement.

17. On June 19, 2006, BOT responded by e-mail (e-mail from Cheri Nygard) indicating that the superintendent wanted to be part of the negotiations and suggesting the dates of July 6, 7, 11, 12, 14 and 17. Copeland responded by e-mail on that date indicating that BTA could not find any dates that matched the proposed July meeting dates and asking BOT to reconsider BTA's proposed June dates. Copeland further stated that if BOT could not find any June dates, then BTA would be available on August 23, 24, and 25, 2006 to negotiate.

18. The district responded that it would reconsider and then suggested the dates of June 29 and June 30, 2006. Copeland responded on June 22, 2006 indicating that these dates were not the ones BTA had proposed and that they would not work. It appears from the tone of the e-mails that the BTA negotiating team, due to vacations and other commitments (such as teacher education requirements), simply was not available to bargain in July. Copeland did state, however, that she would continue to check with the bargaining team to see if any earlier dates in July or August would become suitable.

19. Also on June 19, 2006, BOT decided to transfer certain teachers from their existing positions to different positions with different duties for the 2006-2007 school year. Exhibit F. On that same date, letters to that effect were sent to the teachers being transferred. BTA was not informed at that time of the transfers.

20. On June 22, 2006, BOT offered to bargain on June 29, 30, or July 1, 2006.

21. On June 22, 2006, Copeland declined this offer, but promised to let the BOT know if any dates opened up in July or August 2006.

22. On June 27, 2006, Copeland demanded that BOT provide her by June 28, 2006 with numerous documents related to collective bargaining.

23. At the July 7, 2006 special school board meeting, Smith presented BOT with his proposal for implementation of a new RIF policy. Exhibit 6, Minutes of July 7, 2006 special board meeting. Smith also proposed that the five least senior teachers in the district, Marilyn Leinen, Laurie Wilson, Tracy Kjelhaus, Heather Nevins and Julie Hill, be RIFed prior to the upcoming school year. BOT adopted both the new RIF policy and Smith's proposed implementation of the RIF against the five teachers. Exhibit 6, IV, paragraph numbered 3.

24. On the same day as the BOT voted to implement the RIF against the five teachers, letters were sent to those teachers advising them that they would be dismissed. Exhibit 5.

25. Leinen, Wilson, and Kjelhaus were subsequently recalled to teaching positions prior to the beginning of the 2006-2007 school year. The two other teachers, Nevins and Hill, were offered non-bargaining unit teaching positions, but declined their respective offers.

26. Although there had been discussion about meeting to bargain over a successor CBA, there had been no discussions between BTA and BOT that could be construed to have reasonably put BTA on notice that the RIF policy had been adopted or the means by which it would be implemented. Certainly, there had been no opportunity given BTA to bargain over the implementation of the RIF.

27. On July 10, 2006, Smith sent an e-mail to Copeland which included a copy of the BOT's newly adopted RIF policy. Smith specifically noted, "As was stated prior, this policy would not be sent to you until adopted by the Board of Trustees." Exhibit E, July 10, 2006 e-mail from Smith to Copeland.

28. The new RIF policy (Exhibit E) provided that the BOT had the "exclusive authority" to determine the appropriate number of employees" to RIF. It further provided that the BOT may reduce the number of tenured teachers and in doing so "shall select the teacher(s) in the affected curricular area based on qualifications, performance, and seniority." The previous policy had stated that "the Board will consider performance evaluations, staff needs, and other reasons it deems relevant in determining the order of dismissal when it reduces classified staff or discontinues some type of educational service."

29. On July 17, 2006, Copeland wrote a letter to Joe Maronick (an Employment Relations Division investigator) in support of her charge that BOT had refused to bargain with BTA. On that same date, Smith provided a letter to Copeland acknowledging for the first time that the district had implemented a transfer of teachers for the 2006-2007 school year.

30. On July 18, 2006, BTA's attorney, Richard Larson, wrote a letter to Smith informing him that the teachers waived their right to a board hearing on the recommendation for their termination. The letter also advised Smith that the decision not to be present at the termination hearing was not a waiver of BTA's right to continue to pursue its ULP against BOT for unilaterally implementing both the transfer and the RIF. Exhibit 9.

31. On July 20, 2006, Copeland wrote another letter to Maronick in support of her charge that BOT had refused to bargain with BTA.

32. On July 27, 2006, BOT through Smith contacted Copeland and stated for the first time that it wished to meet "for negotiations on the certified contract." That e-mail also agreed to meet to bargain on July 28, 29, 30, 31, August 1, 2, 3, 4, 7, 8, 9, 10, 11, 14, 15, 16, 17 and 18, 2006. Exhibit 13, Smith e-mail to Copeland dated July 27, 2006.

33. On July 27, 2006, Copeland agreed to pass on the proposed bargaining dates to BTA officers and asked Superintendent Smith for a statement of the issues over which the BOT wished to bargain. Exhibit 13.

34. Having received no response from Smith to her July 27, 2006 e-mail, Copeland on August 1, 2006 again asked for a statement of the issues over which BOT wished to bargain. Exhibit 13. Smith stated "I will once again ask you what are the issues the district wishes to bargain over? I ask because your legal counsel argued in defense of the unfair labor practice [that] the BTA filed that the district [BOT] had no obligation to bargain with BTA because they missed the March 1 deadline. Additionally, the district refused and your legal counsel concurred that you had no obligation to bargain over the need for a RIF and transfer as well as the criteria (process) for both RIF and transfer." Copeland went on to explain that given the lateness of BOT's request, BTA wanted "to know exactly the scope of bargaining and we will consider your request to bargain." Exhibit 13, Copeland's August 1, 2006 e-mail to Smith.

35. On August 2, 2006, Smith submitted a bargaining proposal to Copeland. It contained 22 different items. BOT's proposed items of bargaining did not include any written reference to bargaining over the RIFs or the transfer of the teachers.

36. On August 3, 2006, Smith e-mailed two alternative proposals to Copeland. These proposals delved into the CBA in areas of teacher duties, teacher workday, teacher work year, extracurricular stipends and salary. Again, there was no discussion about RIF or transfer. On August 8, 2006, Copeland responded to Smith's e-mail and told him that BTA was "declining the district's request to open the contract." Exhibit 13.

37. On August 10, 2006, BOT filed its unfair labor charge against BTA, alleging a refusal to bargain.

38. On August 11, 2006, BOT filed an amended unfair labor practice charge against BTA, alleging a refusal to bargain.

39. The parties began to meet in October 2006 to negotiate on certain matters. The parties' first bargaining session occurred by telephone on October 17, 2006.

IV. DISCUSSION[3]

The parties have presented "dueling" ULPs in this matter. BTA asserts that BOT had an obligation to bargain on both the adoption and implementation of the RIF policy as well as reassignment of certain other teachers. BOT contends that the lack of any contractual obligation coupled with its statutory management rights obviated any need to bargain over the adoption or implementation of the RIF or the reassignment of the teachers. BOT further contends that in any event BTA waived its right to bargain by not sooner meeting with BOT to bargain over the CBA even though BTA had multiple opportunities to bargain with BOT. BOT's unfair labor practice charge against BTA asserts that BTA unlawfully failed to bargain over the implementation of the 2005-2006 CBA. BTA counters that the CBA was

[3]Statements of fact in this opinion are hereby incorporated by reference to supplement the findings of fact. *Coffman v. Niece* (1940), 110 Mont. 541, 105 P.2d 661.

automatically renewed because neither side requested to bargain prior to March 1, 2006. Each of these charges will be explored separately.

A. *BTA's ULP*

1. *Under the Montana Public Employees Collective Bargaining Act, a Fiscally Motivated Decision to RIF Was Not the Subject of Mandatory Collective Bargaining.*

Because of the similarity between the National Labor Relations Act (NLRA) and Montana's public employees' collective bargaining law, federal administrative and judicial construction of the NLRA is instructive and often persuasive regarding the meaning of Montana's labor relations law. *E.g.*, *Great Falls v. Young* (1984) (*Young III*), 211 Mont. 13, 686 P.2d 185; *State ex rel. B.P.A. v. District Court* (1979), 183 Mont. 223, 598 P.2d 1117. The Montana Supreme Court looks to the construction placed on the National Labor Relations Act (NLRA) by the federal courts as an aid in interpretation of the Montana Public Employees Collective Bargaining Act. *Small v. McRae* (1982), 200 Mont. 497, 651 P.2d 982; *followed in Brinkman v. State* (1986), 224 Mont. 238, 729 P.2d 1301.

Lay offs (including RIFs) and lay off procedures can be subjects of mandatory bargaining under the NLRA, because loss of employment impacts "other conditions of employment" under Section 9(a) of the Act. *Odebrecht Contractors of Calif., Inc.* (1997), 324 N.L.R.B. 396, 397; *see also*, *Falcon Wheel Division L.L.C.* (2002), 338 N.L.R.B. 576.[4] Under the Montana Public Employees Collective Bargaining Act, the same analysis might apply to decisions about both lay offs (including RIFs) and adoption of lay off procedures, for public employees having collective bargaining exclusive representatives, absent Montana authority addressing the question.

The Montana Public Employees Collective Bargaining Act makes it an unfair labor practice for a public employer, such as the district, to refuse to bargain collectively in good faith with an exclusive representative, such as the association. Mont. Code Ann. § 39-31-401(5). The duty to bargain collectively extends to meeting at reasonable times and negotiating in good faith with respect to "wages . . . and other conditions of employment or the negotiation of an agreement or any question arising thereunder." Mont. Code Ann. § 39-31-305(2), incorporated into the duty to bargain collectively by Mont. Code Ann. § 39-31-305(1).

On its face, continued employment of an employee is a condition of employment, which therefore would be a mandatory subject of bargaining for purposes of Mont. Code Ann. § 39-31-305(2). However, the collective bargaining for public employees laws also provide:

> Public employees and their representatives shall recognize the prerogatives of public employers to operate and manage their affairs in such areas as, but not limited to:

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[4] *Falcon Wheel at* 576, *quoting Odebrecht Contractors*: "It is well established that 'a layoff of employees effects a material, substantial, and significant change in the affected employees' working conditions,'" *citing NLRB v. Katz* (1962), 369 U.S. 736, 747; *Ladies Garm.Wrkrs Loc. 512 v. NLRB* (9th Cir. 1986), 795 F.2d 705, 710-711; *Rangaire Co.* (1992), 309 NLRB 1043, 1047; *and quoting NLRB v. Advertisers Mfg. Co.*, (7th Cir. 1987) 823 F.2d 1086, 1090 ("Laying off workers works a dramatic change in their working conditions (to say the least) . . . .").

(2) hire, promote, transfer, assign, and retain employees; (3) relieve employees from duties because of lack of . . . funds . . .
Mont. Code Ann. § 39-31-303 (emphasis added).

Montana law also provides that the trustees of each district "shall (1) employ or dismiss a teacher, principal, or other assistant upon the recommendation of the district superintendent, the county high school principal, or other principal as the board considers necessary, accepting or rejecting any recommendation as the trustees in their sole discretion determine, in accordance with the provisions of Title 20, chapter 4 . . . ." Mont. Code Ann. § 20-3-324(1). These management rights statutes flow from Art. X, Sec. 8, Mont. Con. 1972 which states:

> The supervision and control of schools in each school district shall be vested in a board of trustees to be elected as provided by law.

Federal decisions are of limited value in addressing this question because the National Labor Relations Act does not have comparable statutory management rights language. Other states have split on whether lay offs of teachers and other public employees for fiscal reasons are properly subjects of mandatory bargaining, depending on the relative weight each jurisdiction's law gives to school board discretion versus commitment to collective bargaining for public employees. ***See*** 9 A.L.R.4th 20, "What Constitutes Unfair Labor Practice under State Public Employee Relations Acts" (Sheafer), §7; 84 A.L.R.3d 242, "Bargainable or Negotiable Issues in State Public Employment Labor Relations" (Tussey), §20.

The Montana Supreme Court previously determined that the selection of teachers and the "concomitant right of nonrenewal" is "exclusively the province of the school boards." *Wibaux Ed. Assoc. v. Wibaux County High School.* (1978), 175 Mont. 331, 573 P.2d 1162, 1165. The Court concluded, under the then applicable law, that "the legislature had given school boards the exclusive right to hire and terminate teachers." *Id. at* 1164. Based upon this decision, the Montana Attorney General later issued an opinion that a school board could not delegate its power to hire and fire principals to its superintendent. 37 Op. Atty Gen. Mont. 560 (1978), Opinion 133.

A similar issue surfaced in *Savage Public Schools v. Savage Ed. A.* (1982), 199 Mont. 39, 647 P.2d 833, 833-34. However, the Montana Supreme Court noted, "Because the question is not properly before us, we do not address the other issue raised by appellants: Whether a school district may agree to arbitrate the substantive basis of nonrenewal of a nontenured teacher." The Court held that the district could agree to procedures necessary before nonrenewal of a nontenured teacher and that with a CBA clause that applied arbitration to disputes about compliance with the CBA, refusal by the district to arbitrate whether it followed the specific contractual procedures to terminate a nontenured teacher (by not rehiring the teacher for another year) was an unfair labor practice. *Savage* (1982) *at* 833-34. Following remand of *Savage* (1982), the arbitrator ordered reinstatement of the teacher as the remedy for failure to follow the agreed procedures, and the Court ultimately reinstated that ruling. *Savage Ed. A. v. Trustees* (1984), 214 Mont. 289, 692 P.2d 1237, 1239-40.

The Court did not distinguish or apply *Wibaux* in *Savage* (1982) and again refused to consider that issue in *Savage* (1984).

Neither *Wibaux* nor the attorney general's opinion based upon it directly address whether a school board can or must bargain about the fiscal lay off of a tenured teacher. Both authorities do hold that a public school board has (absent anti-union animus) unfettered discretion in substantive hiring and firing decisions for nontenured teachers. Logically, a public school board exercises the same unfettered discretion in deciding to RIF a tenured teacher for budgetary reasons.

Delineating the boundaries of a school board's exclusive province for exercising its unfettered discretion regarding operations is not easy. As the Connecticut Supreme Court remarked:

> To decide whether [particular] . . . items . . . are mandatory subjects of negotiation, we must direct our attention to the phrase "conditions of employment." This problem would be simplified greatly if the phrase "conditions of employment" and its purported antithesis, educational policy, denoted two definite and distinct areas. Unfortunately, this is not the case. Many educational policy decisions make an impact on a teacher's conditions of employment and the converse is equally true. There is no unwavering line separating the two categories. It is clear, nevertheless, that the legislature denoted an area which was appropriate for teacher-school board bargaining and an area in which such a process would be undesirable.
> *West Hartford Ed. A., Inc. v. DeCourcy* (Conn. 1972), 295 A.2d 526, 534-35.

In the present case, the district exercised its responsibility and authority pursuant to Art. X, Sec. 8, Mont. Con. 1972 and Mont. Code Ann. § 20-3-324(1) when it decided (acting through its duly elected school board), without any illegal anti-union animus, that its budgetary constraints required it to implement RIFs. The hearing officer concludes that BOPA should hold that the substantive basis for this specific decision in this instance was not subject to mandatory bargaining.

2. *BOT Engaged in an Unfair Labor Practice by Refusing to Bargain and Acting Unilaterally to Implement the RIF in this Case.*

The facts in this case show that the district unilaterally implemented the RIF procedure it adopted without input from the union. Copeland asked at least three times between March and July 2006 to bargain over the implementation of the RIF. BOT ignored this request. It instead unilaterally implemented the RIF procedure as evidenced by Smith's July 10, 2006 e-mail to Copeland. The issue is whether the district was obligated to bargain (to agreement or impasse) before taking the actions. Answering this question requires a three-part analysis: (1) Are the actions a mandatory subject of bargaining; (2) If so, did the association exercise its right to bargain by agreeing in the CBA to a provision that gave the district the right to take the actions without any further bargaining and (3) If not, did the association waive its rights to

bargain over adoption and implementation of a new RIF policy regarding budgetary lay off of a teacher? *NLRB v. U.S. Postal Service* (D.C. Cir. 1993), 8 F.3d 832.[5]

The implementation of a procedure to effectuate a fiscally motivated decision to RIF and transfer teachers was a subject of mandatory collective bargaining. Once the school board exercised its power to supervise and control the district by concluding the RIF of teachers was necessary because of budgetary constraints, it reached the border of that area in which collective bargaining was "undesirable."

Under current Montana Board of Personnel precedent, involuntary teacher transfer and reduction in force implementation are mandatory subjects of bargaining. *Florence-Carlton Unit v. Trustees, Sch. D. No. 15-6* (1979), ULP 5-77, pp. 13-15. The hearing officer in that case acknowledged the existence of the management rights statutes contained in the Public Employee Bargaining act, but held nonetheless that RIF and transfer were subject to mandatory bargaining.[6] BOT has provided no authority that would permit the hearing officer, whose power derives from the Board of Personnel Appeals, to ignore this precedent. On this basis alone, the hearing officer would be compelled to conclude that BOT's RIF and transfer were the subjects of mandatory bargaining.[7]

Beyond, this, however, the reasoning of *Florence-Carlton* ultimately compels the hearing officer to reach the same conclusion. To harmonize the Montana statutes that govern both the obligation to bargain and management rights, the Board, in *Florence-Carlton*, adopted a balancing test, holding that whether an issue was a mandatory bargaining subject depended on "how direct the impact of an issue is on the well being of the individual teacher, as opposed to its effect on the operation of the school system as a whole." Hearing Officer's Recommended Order[8] *at* 6, *citing NEA Shawnee Mission. v. Bd of Ed.* (Kan. 1973), 512 P.2d 426; *superceded by statute, Unf. Sch. D. No. 501 v. D.H.R.* (Kan. 1985), 685 P.2d 874; *Penn. Labor Rel. Bd v. State College Area Sch. D.* (Pa. 1975), 337 A.2d 262.

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[5] In most circumstances, NLRA decisions can be instructive in applying Montana collective bargaining law.

[6] The mangment rights statute in force at the time of the decision, RCM 59-1603(2), contained the identical language contained in the present management rights statute, Mont. Code Ann.§ 39-31-303.

[7] The Montana District Court's decision in *Bonner Ed. Assoc. v. Bonner S. D.* (8/21/06), ADV-2005-719, First Judicial District (currently on appeal to the Montana Supreme Court) is not binding precedent in this matter. *Stare decisis* is a Latin phrase which "means that when the highest appellate court of the jurisdiction has once laid down a principle applicable to a particular given state of facts, it will adhere to that principle and apply it to all future cases, irrespective of whether the parties and property are the same. *State v. Dietz* (1959), 135 Mont. 496, 343 P.2d 539, 541. The district court's decision in *Bonner* controls only the *Bonner* case unless and until the Montana Supreme Court reviews and rules upon its correctness. In contrast, this tribunal derives its authority to act from the statutes creating and implementing the Board of Personnel Appeals. In *Florence-Carlton*, the Board of Personnel Appeals established its precedent in a case presenting similar factual and legal issues to those in this matter. The hearing officer is bound to follow that precedent until such time as the Board, the district court in review of this case, or the Montana Supreme Court in some other case overrules the precedent set by *Florence-Carlton*.

[8] The Board adopted the recommended order as its final order on June 11, 1979.

As the Board noted in *Florence-Carlton*:

> Topics proposed for negotiation, like words in a sentence, take on color and meaning from their surrounding context. Viewed in the abstract, the demand to negotiate over 'the level of service to be provided' for example, would seem to be a matter . . . not negotiable except at the discretion of the County. . . . In the context of a specific situation, however, a demand for a lower maximum case load for social workers, for example, although theoretically related to the level of service to be provided, might be much more directly related to the terms and conditions of employment.

Id. at 5, citing a document entitled, "Aaron Committee Report," July 1968.

In some jurisdictions[9], choosing procedures to pick which public employees to lay off is a subject of mandatory bargaining, although the budgetary decision to lay off public employees is not. *Ferree v. Bd. of Ed.* (Iowa 1983), 338 N.W.2d 870*; Saydel Ed. Assoc. v. Pup. Employment Rel. Bd.* (Iowa 1983), 333 N.W.2d 486; *School Comm. of Newton v Labor Rel. Com.* (Mass. 1983), 447 N.E.2d 1201; *Fire Fighters Union v. Vallejo* (Cal. 1974), 526 P.2d 971. The same reasoning applies here. The elected representatives of the school district, the trustees, are charged with the duty to decide how the Brockton school district best can spend the public funds available for education. However, having decided in their unfettered discretion that it was necessary to RIF tenured teachers, they could not exercise that same unfettered discretion in adopting a procedure by which to pick the tenured teachers to discharge. That was properly a subject of mandatory bargaining regarding the most basic condition of employment–remaining employed. Putting it in simple terms, choosing which teachers to fire to cut costs had a far heavier direct impact on the individual teacher's well-being than on the operation of the school system as a whole.

BOT's argument that it "made no change in any policy, practice or collective bargaining" nor was there any past practice, statute or contract provision which limits the District's right to lay off tenured teachers"(BOT's Opening brief, pp. 11 and 12) misses the point. The harm here to the precepts behind the collective bargaining statutes was the unilateral decision on the implementation of the RIF and transfers which affected the individual teacher's well-being far more than the district's operation of the school system. This conduct, under the *Florence -Carlton* analysis, created the very strife that the statutes were designed to prevent. The absence of any past practice in this regard did not change the fact that this conduct was the subject of mandatory bargaining which should have been bargained over prior to its implementation. The hearing officer concludes that the Board of Personnel Appeals should hold that the adoption and implementation of a procedure to effectuate the RIF and transfer was a subject of mandatory collective bargaining.

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[9] As already noted, some jurisdictions, making a greater commitment to collective bargaining as opposed to school board discretion than appears in current Montana law, hold that the decision to lay off public employees for fiscal reasons is a subject of mandatory bargaining.

The absence of any specific RIF provisions in the CBA did not relieve the district of the duty to bargain regarding the procedure to RIF and the transfer.[10] The purpose of labor relations is the good faith negotiation of the mandatory subjects of bargaining--wages, hours, and other terms and conditions of employment. For the district to make unilateral changes concerning mandatory subjects of bargaining is a direct violation of the requirement of good faith bargaining. *NLRB v. Katz* (1962), 369 U.S. 736. Absent, among other things, a contractual relinquishment of the right to bargain, the obligation to bargain before making such changes continues during the term of the collective bargaining agreement. *NLRB v. Sands Manufacturing Co.* (1939), 306 U.S. 332, 342.

BOT contends that the absence of any RIF provision in the 2003-2006 CBA, coupled with its management rights contained in Article 4 of the agreement, demonstrates that BOT had the power to act unilaterally in the implementation of the RIF. The hearing officer does not agree. The obligation to bargain collectively can only be relinquished by clear and unmistakable language in the CBA. *Metropolitan Edison Co. v. NLRB* (1983), 460 U.S. 693. A general management rights clause with no reference to any particular subject area does not suffice to establish such a relinquishment. *See, e.g., Michigan Bell Telephone Co.* (1992), 306 NLRB 281. The management rights clause of the 2003-2006 CBA is general and makes no express reference to RIFs. *Cf. also, School Comm. of Newton*, *supra* (fact that dispute arose during midterm of collective bargaining agreement still required bargaining over layoff procedures where subject of reduction in force had been neither negotiated nor bargained over prior to execution of agreement).

The 2003-2006 CBA expressly incorporated the general panoply of statutory management rights and incorporated the statutory collective bargaining mandate by repetition of the pertinent language ("collective bargaining concerning wages, hours, fringe benefits and other conditions of employment"). The 2003-2006 CBA, as it applies to RIFs, is necessarily ambiguous, because it never mentioned RIFs. Even if the reservation of management rights was intended to incorporate the rights reserved under the particular provisions of Mont. Code Ann. § 39-31-303 and Mont. Code Ann. § 20-3-324, it does not follow that the district thereby acquired unfettered discretion to choose which teachers to RIF. Rather, after the district exercised its discretion by making a budgetary decision to RIF five teachers, the district's right to pick which teachers to RIF and transfer had to be balanced against the obligation to bargain regarding conditions of employment. Accordingly, the hearing officer concludes that BOPA should hold that the CBA did not relieve the district from the duty to bargain over adoption and implementation of a procedure to effectuate a fiscally motivated RIF of a tenured teacher.

BTA did not waive its rights to bargain. When an employer notifies the union of a proposed change, and the union fails to request bargaining, the union has waived bargaining on the issue. *See, e.g., Haddon Craftsmen, Inc.* (1990), 300 NLRB 789, 790, *review den. sub nom.*

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[10]Much of the case law addressing interpretation of a management rights clause is written in terms of "waiver." In this case, "waiver" refers instead to the district's assertion that the association failed timely to request bargaining. The hearing officer has omitted the word "waiver" in discussing the authorities in this section of the discussion. The holdings are accurately described in other words, to avoid unnecessary confusion.

Graphic Communications Internat., Local Union No. 97B v. NLRB (3rd Cir. 1991), 937 F.2d 597. The record here shows that prior to Smith's July 10, 2006 e-mail to Copeland, the district did nothing to inform BTA of the RIF and the specific teachers who would be impacted by it. BOT certainly did nothing to facilitate bargaining on the issues.

BOPA has found waivers of rights to bargain when complainants had actual knowledge of the actions of the defendants and did not request bargaining. In *Beaverhead Fed. of Teachers v. Beaverhead County High School*, ULP 10-2001 (Oct. 29, 2002), federation members and district management discussed possible rescheduling of a driver's education course during November and December. In January through April of the next calendar year, there were multiple meetings (including 2 public meetings of the board of trustees attended by federation members), leading to a decision by the district in May to reschedule the course, all without any request to bargain from the federation. *Beaverhead* cited an earlier BOPA case, *Browning Fed. of Teachers v. Browning Public Schools*, ULP 17-2001 (Nov. 26, 2001). In *Browning*, the federation knew that the district had been paying pre-employment incentives to prospective employees for several years, before the unfair labor practice charge.

Both *Beaverhead* and *Browning* involved far different situations from the instant case. In those cases, the unions were provided notice of impending action. Here, BTA was accorded no such notice until after the implementation of the RIF and the transfers had occurred. More importantly, Copeland made ***at least three timely requests to bargain*** over the RIF procedures and asked for information on those procedures, something which the complainants in *Beaverhead* and *Browning* never did. Her requests were ignored and on July 7, 2006, well before Copeland was put on notice of the RIFs, the affected teachers were notified by mail of their dismissal. It was not until July 10, 2006 that Copeland's requests were partially answered with Smith's indication that the RIF would be implemented and that the specific teachers would be subjected to the RIF. BTA is absolutely correct in asserting (and the hearing officer finds) that BOT had no intention of bargaining over the implementation of the RIF and transfers.

Obviously appreciating that the evidence demonstrates that BOT never intended to bargain and did not in fact bargain about the implementation of the RIF prior to springing the change on BTA, BOT now argues that the interim between July 2006 and the beginning of the teaching school year provided the opportunity to bargain that demonstrates BTA's waiver. The hearing officer does not agree for two reasons.

First, the district did not prove any waiver of the right to bargain about RIF procedures. At the time of the filing of BTA's ULP, the RIF and transfers were already accomplished. BTA had not been provided with any real chance for input, despite three requests to be given such input.

Second, Section 14.2 of the contract provides that if either party wishes to reopen the contract, that party must name the specific provisions of the contract which the party requesting negotiations wishes to reopen. Here, BOT included no specific indication in any of its communications with BTA that it intended to open the issue of the RIF and transfer or that it was amenable to opening up those two issues. For example, Smith's July 18, 2006, letter to

Copeland says nothing about negotiating over the RIF or the transfers.[11] Thus, taking the 2003-2006 CBA language at face value, there was simply nothing that would reasonably have put BTA on notice that BOT was open to negotiating over the implementation of the RIF policy or the transfers.

Indeed, this same provision undercuts Smith's testimony at hearing that BOT was open to negotiating over the RIF or transfer. In light of the clear language of the 2003-2006 CBA, had BOT intended to negotiate over the RIF and transfers, it would have stated as much. The hearing officer concludes that BTA did not waive its right to demand collective bargaining on the procedures for selecting the teachers to RIF or the transfer of the other teachers. The hearing officer further concludes that BOT committed an unfair labor practice in unilaterally adopting without bargaining and implementing a procedure to identify and RIF five tenured teachers and in transferring the other teachers without bargaining with the union over the implementation of those RIFs and transfers.

B. *BOT's ULP*

The crux of BOT's ULP complaint is that BTA committed an unfair labor practice by refusing to meet and bargain over a successor CBA. BOT posits that BTA waived the untimely notice of the desire to bargain over a successor agreement by initiating and then pursuing efforts to bargain over a new CBA, which efforts included filing of an unfair labor practice. BTA argues that it had no obligation to bargain as the 2003-2006 CBA automatically renewed by virtue of the parties' failure to request bargaining prior to March 1, 2006 as contemplated by the 2003-2006 CBA.

The suggestion that BTA waived the untimeliness by filing its unfair labor practice is a mischaracterization of BTA's ULP. BTA's ULP was filed in response to BOT's failure to discuss or even disclose to BTA the impending RIF and teacher transfer. This act by itself does not evince an intention on the part of BTA to reopen negotiations despite the untimeliness of the negotiations. Rather, it shows that BTA's intent in pursuing the ULP was to correct the wrong it perceived from BOT's unilateral implementation of the RIF and transfer.

This leaves, then, the consideration of whether BTA's other conduct in fact amounted to a waiver of the untimely notice to begin bargaining. To say the least, it is disingenuous for BOT to now argue that BTA waived untimely notification when BOT itself argued in response to BTA's ULP that BTA's notice to bargain was untimely and therefore the 2003-2006 CBA automatically renewed. See BOT's response to BTA's ULP. BOT appears to be playing both sides of this argument in an effort to win its ULP. Because BOT asserted that the contract automatically renewed, BOT should be estopped from arguing that BTA committed an unfair labor practice by agreeing with BOT that the agreement automatically renewed.

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[11]This was not mere oversight on the part of BOT. It is obvious from the evidence presented at hearing that BOT has always taken the position that its statutory management rights under Mont. Code Ann. § 20-3-324 remove the implementation of a RIF or transfer from the requirement to bargain, a precept with which the hearing officer, for the reasons stated above, does not agree.

As BOT notes in its closing brief, the policy behind the collective bargaining statutes for public employees "is to encourage the practice and procedure of collective bargaining to arrive at friendly adjustment of all disputes between public employers and their employees." Mont. Code Ann. § 39-31-101. BOT itself created the situation that it now confronts by asserting that the CBA automatically renewed and then doing an about face in order to pursue its own ULP against the union. Thus, the equities in this matter do not favor BOT's argument in its ULP.

The authority cited by BOT for the proposition that BTA waived the untimely notice to bargain is inapposite. In none of those cases did the party asserting the waiver essentially bait the other party into adopting the position as occurred in this case. It is apparent from Copeland's August 1, 2006 e-mail that she was simply following BOT's lead in arguing that the contract had automatically renewed and, therefore, there was no need to bargain. BOT, not BTA, caused the problem here and it should not be rewarded when it has unclean hands. Accordingly, the hearing officer does not find under the facts of this case that BTA committed an unfair labor practice.

C. *The Appropriate Remedy*.

Upon determining by a preponderance of the evidence that an unfair labor practice has occurred, BOPA shall issue and serve an order requiring the defendant in the complaint to cease and desist from the unfair labor practice it committed. Mont. Code Ann. § 39-31-406(4). BOPA shall further require the defendant to take such affirmative action, which may include restoration to the *status quo ante*, "as will effectuate the policies of the chapter." *Id.; see also*, *Keeler Die Cast* (1999), 327 NLRB 585, 590-91; *Los Angeles Daily News* (1994), 315 NLRB 1236, 1241; *cf. Savage* (1984), *op. cit. at* 1239 (reversing district court and affirming arbitrator's order requiring full reinstatement of nontenured teachers to their former or comparable positions, together with back pay less all interim earnings from the effective date of termination to the date of reinstatement or refusal of reinstatement).

In its ULP, BTA requests restoration of the *status quo ante*. BOPA should declare the district's RIF criteria void, order the district to cease and desist implementation of its RIF criteria, begin bargaining with the association over appropriate RIF criteria and offer full reinstatement to Heather Nevins and Julie Hill to their former or comparable positions, with fringe benefits and lost wages (less all interim earnings from the effective date of termination to the date of reinstatement or refusal of reinstatement) with interest (10% annual simple interest, Mont. Code Ann. §§ 27-1-211 and 25-9-204), and impose a posting requirement. Interest awards encourage prompt compliance with BOPA orders and discourage unfair labor practices, effectuating the legitimate ends of labor legislation. *Young III, op. cit.*, *citing Florida Steel* (1977), 231 NLRB 651.

V. CONCLUSIONS OF LAW

1. The Board of Personnel Appeals has jurisdiction over this case.

2. BTA's unilateral implementation of a procedure to effectuate a fiscally motivated decision to RIF the five teachers and transfer the other teachers was a subject of mandatory collective bargaining.

3. BTA did not waive its rights to bargain.

4. BOT committed an unfair labor practice by unilaterally adopting and implementing a procedure to identify and RIF the five tenured teachers and by transferring the other three teachers without first bargaining with BTA.

5. BTA did not commit an unfair labor practice.

6. The proper remedy for the unfair labor practice is an order from BOPA that declares BOT's RIF criteria void, orders BOT (a) to cease and desist implementation of its RIF criteria; (b) to begin bargaining with the association over appropriate RIF criteria and (c) to reinstate Heather Nevins and Julie Hill, with fringe benefits and lost wages with interest, and impose a posting requirement.

VI. RECOMMENDED ORDER

Brockton Board of Trustees is hereby **ORDERED**:

1. Immediately to cease unilaterally adopting reduction of force and transfer criteria applicable to tenured teachers within the bargaining unit represented by Brockton Teacher's Association, MEA-MFT, NEA, AFT, AFL-CIO, eliminate as void the RIF criteria and transfers, and cease otherwise altering terms and conditions of employment subject to the collective bargaining agreement without bargaining.

2. Within 30 days of this order:

(a) To begin bargaining with the BTA over appropriate RIF and transfer criteria;

(b) To offer full reinstatement to Heather Nevins and Julie Hill to their former or comparable positions, with fringe benefits and lost wages (less all interim earnings from the effective date of termination to the date of reinstatement or refusal of reinstatement) with interest at 10% per annum (simple); and

(c) To post copies of the notice contained in Appendix A at conspicuous places, including all places where notices to employees are customarily posted, at the Brockton Schools for 60 days and to take reasonable steps to ensure that the notices are not altered, defaced or covered by any other material.

3. There being no factual basis for BOT's ULP, that ULP is dismissed.

DATED this 19th day of April, 2007.

BOARD OF PERSONNEL APPEALS
By: /s/ GREGORY L. HANCHETT
GREGORY L. HANCHETT
Hearing Officer

NOTICE: Exceptions to these Findings of Fact, Conclusions of Law and Recommended Order may be filed pursuant to Admin. R. Mont. 24.26.215 within twenty (20) days after the day the decision of the hearing officer is mailed, as set forth in the certificate of service below. If no exceptions are timely filed, this Recommended Order shall become the Final Order of the Board of Personnel Appeals. Mont. Code Ann. § 39-31-406(6). Notice of Exceptions must be in writing, setting forth with specificity the errors asserted in the proposed decision and the issues raised by the exceptions, and shall be mailed to:

Board of Personnel Appeals
Department of Labor and Industry
P.O. Box 6518
Helena, MT 59624-6518

APPENDIX A

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE STATE OF MONTANA
BOARD OF PERSONNEL APPEALS

The Montana Board of Personnel Appeals has found that we violated the Montana Collective Bargaining for Public Employees Act and has ordered us to post and abide by this notice.

We will not fail to bargain in good faith with the Brockton Teachers' Association;

We will cease unilaterally adopting RIF and transfer criteria applicable to tenured teachers within the bargaining unit represented by the BTA, eliminate as void the RIF criteria unilaterally adopted on July 7, 2006, and cease otherwise altering terms and conditions of employment subject to the collective bargaining agreement with the BTA without prior bargaining with the BTA;

We will engage in negotiations with the Brockton Teachers' Association over RIF and transfer criteria applicable to members of the bargaining unit.

DATED this _____ day of _____, 2007.

Brockton Board of Trustees, Brockton Public Schools

By:_____
Board Chair:

_____
Office: